IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.650 OF 2007
IN
NOTICE OF MOTION NO.3412 OF 2006
IN
L.C. SUIT NO.3966 OF 2006

Shitala Prasad
Shyamsunder Shukla .. Appellant
(Org.Plaintiff)

Versus

1. Municipal Corporation of
Greater Bombay

2. Advance Builders India Pvt. Ltd.

3. Khotwadi Bhimwada Zopadpatti
Punarvikashan Samittee SRA

4. Chouhan Builder India
Housing Development Pvt.Ltd...Respondents
(Orig.Defendants)

Mr.Anil Singh i/b. R.O. Pathak for the Appellant
Ms.S.G. Surana for Respondent No.4
Ms.Geeta Jogalekar for Respondent/BMC

CORAM : S.R. SATHE,J.
DATED : 06/09/2007

ORAL ORDER :-

1. The Appellant-original Plaintiff in L.C. Suit No.3966 of 2006 has preferred this appeal against the order passed by the Judge, City Civil Court, Bombay whereby the Notice of Motion No.3412 of 2006 filed by the Plaintiff for restraining defendants in particular

defendant No.1 Municipal Corporation of Greater Mumbai (hereafter referred to as MCGM) from demolishing the suit property and obstructing Plaintiff's possession of the same without following due process of law was dismissed. For the sake convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

It is Plaintiff's case that he is the owner of chawl consisting of 16 rooms situated at Firozshah Mehta Road, 29, Khot Wadi, Santacruz (West), Mumbai-400054, situated on land bearing CTS No.1746, 1746/27 to 36, Survey No.151, Hissa No.5A (pt), BMC Original Plot No.107 which is hereafter called as suit property. The defendant No.1 is the Municipal Corporation of Greater Mumbai while defendant No.2 is previous owner of the land where chawl is situated. Father of the Plaintiff had taken the suit property in the year 1936 on ground lease from the original owner of the land namely N.J. Wadia Trust settlement on Juhu-Vileparle through Court Receiver, High Court Bombay at the ground

rent of Rs.10/-. According to Plaintiff, such ground rent was paid till the year 1961 but thereafter, nobody recovered the said ground rent. After the land was taken on lease Plaintiff's father constructed the suit property on the said land. The suit property was assessed by the then Bandra Municipality and Plaintiff used to pay municipal taxes of the same till the year 1959. Thereafter, no tax was recovered by any one. Most of the rooms in the suit chawl are given to tenant by the Plaintiff and 3 rooms out of the said chawl are in actual possession of the Plaintiff.

3. The defendant No.1 Corporation started claiming that they have purchased the suit property in the year 1973. However, according to Plaintiff, defendant No.1 has not actually purchased the said property because it was not owned by the vendor of defendant No.1. Thus, according to Plaintiff, though, defendants were not owner of the suit property they started claiming that suit property has been declared as slum. Not only that but defendant No.1 demolished 3 structures of Plaintiff on suit property and then started giving threat that they would also demolish the entire suit property and

for that purpose asked the Plaintiff and his tenants to vacate the suit property without giving any notice or following due process of law. Hence, Plaintiff filed the present suit for declaration that defendants are not concerned with the suit property and action of defendants threatening Plaintiff to demolish is illegal. Plaintiff also prayed for the permanent injunction restraining defendants from demolishing the suit property without following due process of law.

4. On the date of filing of the suit Plaintiff also filed Notice of Motion No.3412 of 2006 and prayed for temporary injunction restraining defendants from demolishing the suit property or disturbing Plaintiff's possession of the suit property without following due process of law.

5. On behalf of defendant No.1, Colony Officer filed reply to the Notice of Motion and opposed the same. The defendant No.1 contended that they have acquired the property bearing final Plot No.106, Santacruz (West) in the year 1959 under Town Planning Scheme-VI and thus, it vests in MCGM. The above scheme

came into force on 01/01/1959 while Government Notification No.TPB/3958/M dated 21/08/1958 was issued and first variation was sanctioned under No.TPB/4382/420/CR and CTS numbers bearing 1746, 1746/27-36 were amalgamated in the final plot No.106 and the same vest in the defendants as per Section-88 of the MRTP Act. The defendant No.1 further contended that the entire final plot No.106, TPS VI, Santacruz is taken for development under Slum Rehabilitation Scheme by SRA and it is in the process of the development. Not only that but most of the hutment dwellers coming under the said Slum Rehabilitation Scheme vacated their structure and handed over the vacant possession to the society/ developer by shifting into transit camp/rehabilitation building. Those who did not vacate, action is being taken against them for demolition by following due process under sections 33 and 38 of Maharashtra Slum Areas (Improvement, Clearance and Re-development) Act, 2003 (hereafter referred to as the said Act).

6. The defendant also contended that in the suit property, there are 16 rooms and the occupants of 13

rooms have shown their willingness to shift slum rehabilitation scheme and 4 rooms have already been demolished long back. The Plaintiff never challenged the SRA Scheme but by suppressing material facts filed the present suit. The defendants, therefore, contended that as the defendants are acting as per the provisions of the said Act Plaintiff is not entitled to get injunction in view of the provisions of Section-42 of the said Act.

7. The Chief Promoter of Khotwadi Bhimwada Zopadpatti Punarvikashan Samittee (SRA) i.e. defendant No.3 also filed affidavit in reply and opposed the Notice of Motion on same grounds. Similarly, Director of defendant No.4 Company also filed affidavit in reply and contended that Civil Court has no jurisdiction to try the present suit in view of Section-42 of the said Act. The said defendant further contended that Plaintiff was in fact not the owner of the land but was only owner of the structure but after the time the Town Planning Scheme was finalized on or about 01/07/1985, the suit property came to be merged into final plot No.106 TPS VI Santacruz and BMC became the owner. Thus,

it was contended that Plaintiff being not the owner of the suit property, he is not entitled to claim injunction against true owner. The defendant further contended that SRA has sanctioned the SR Scheme and issued letter of intent in favour of defendant Nos. 3 and 4 and the necessary building plans submitted by them have been sanctioned. Not only that but defendant No.4 has already constructed 4 rehabilitation buildings consisting of 200 tenements and about 150 of the same have already been allotted to eligible slum dwellers. S.R. Scheme is for the benefit of the slum dwellers and Plaintiff has in fact no right, title and interest in the suit property. The defendant, therefore, contended that Plaintiff has not made out any prima facie case and if the injunction as prayed is granted S.R. Scheme can not be completed and it would affect the interest of about 2160 slum dwellers and thus, balance of convenience is not in favour of Plaintiff. The defendant, therefore, prayed for the dismissal of the Notice of Motion.

8. After considering the arguments advanced by the learned Advocates of both the sides, document produced

by both the sides, the learned Judge, City Civil Court, Mumbai came to the conclusion that original Plot No.107 is merged in final plot No.106 and Plaintiff is not the owner of the suit property. The learned Judge also held that S.R. Scheme is made applicable to the suit property and as such, Plaintiff is not entitled for injunction in view of Section-42 of the said Act. He, therefore, dismissed the Notice of Motion.

9. Being aggrieved by the said order Plaintiff has filed the present appeal. In this appeal before me, Shri Anil Singh, learned Advocate for the Plaintiff has urged 3 points. Firstly, he submitted that Plaintiff is the owner of the suit property which is situated on original plot No.107 and the same is not included in final plot No.106 and as such S.R. Scheme is not applicable to the suit property. Secondly, he canvassed before me that the learned Trial Judge without framing any preliminary issue for maintainability of the suit, determined the question about the maintainability. Though, it was in fact mandatory for the Court to frame such issue in view of the Judgement in **Meher Singh V/s.**

Deepak Sawhny and another 1999(1) Bom.C.R.107. Lastly, he submitted that even if it is held that Plaintiff is not the owner or he is unauthorized occupier still then defendant can not demolish the property without following due process of law. He, therefore, submitted that Plaintiff has made out a prima facie case and as such appeal be allowed and temporary injunction as prayed by the Plaintiff be granted. As against this, Mrs. Jogalekar, learned Advocate for the MCGM submitted that Corporation is the owner of the suit property. S.R. Scheme is made applicable to that property. Some of occupants of the buildings in the said plot have already been accommodated in the rehabilitation building. So, Plaintiff has not made out any prima facie case and the appeal be dismissed. Similarly, Shri S.G. Surana, learned Advocate for the defendant No.4 submitted that the original plot No.107 has been merged in Plot No.106 and as a result of the provisions of MRTP Act, the property in question is in fact not owned by the Plaintiff. He also submitted that S.R. Scheme is made applicable to the suit property. If, Plaintiff is entitled under the said scheme for any alternate accommodation then he can apply to the competent

authority. Plaintiff has never challenged S.R. Scheme. Out of 16 rooms of the suit building 13 rooms have been vacated by the occupants and some of them have been accommodated in the rehabilitation building. He, therefore, submitted that Plaintiff is not entitled for injunction in view of the provisions of Section-42 and irreparable loss will be caused to the defendants if the S.R. Scheme is stalled. He therefore submitted that the appeal be dismissed.

10. It is not in dispute that Plaintiff's father was the owner of the structure situated on original plot No.107. If we peruse the rejoinder filed by the Plaintiff then it is very clear that even the Plaintiff has also admitted that S.R. Scheme is applicable to final plot No.106 TPS VI. However, the entire thrust of the Plaintiff's Advocate is on the point that Plaintiff's property bearing old plot No.107 is not included in final plot No.106. However, if we see the approved map on record and the statement produced by the defendant regarding merger of property, it is very clear that old Plot No.107 or C.T. Survey No.1746 is included in final plot No.106. Once it is clear that

town planning scheme has been made applicable to the final plot No.106 then as per the provisions of Section-88, the property in question vests in MCGM i.e. Planning Authority. Section-88 of the MRTP Act says :-

> ***" S.88. Effect of final scheme :- On and after the day on which a final scheme comes into force -***
>
> ***(a) all lands required by the Planning Authority shall, unless it is otherwise determined in such scheme, vest absolutely in the Planning Authority free from all encumbrances;***
>
> ***(b) all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall become subject to the rights settled by Arbitrator;***
>
> ***(c) the Planning Authority shall hand over possession of the final plots to the owners to whom they are allotted in the final scheme."***

11. A feeble attempt has been made on behalf of the Plaintiff to show that at one point of time Deputy Collector, Competent Authority, Andheri had in fact informed to him on 24/09/1985 that C.T. Survey No.1746 is not declared as Slum under section 41 of the said Act. However, as pointed out above, once it is said that the above mentioned Survey Number has been merged in final plot No.106 to which admittedly, S.R. Scheme is applicable, it must be held that there is no substance in the arguments advanced by the learned Advocate for the Plaintiff in this behalf.

12. We can not ignore the fact that the defendants have also clearly stated in the affidavit in reply that steps as per Sections-33 and 38 of the said Act are being taken for the process of demolition. The said apprehension are as under :-

> **"33. Where the Competent Authority is satisfied either upon a representation from the owner of a building or upon other information in its possession that**

the occupants of the building have not vacated it in pursuance of any order or direction issued or given by the Authority, the Authority shall, by order, direct the eviction of the occupants from the building in such manner and within such time as may be specified in the order, and for the purpose of such eviction, may use or cause to be used such force as may be necessary :

Provided that, before making any order under this section the Competent Authority shall give a reasonable opportunity to the occupants of the building to show cause why they should not be evicted therefrom."

"38. Order of demolition of buildings in certain cases.

(1) Where the erection of any building

has been commenced, or is being carried out, or has been completed, in contravention of the provisions of section 8 or of any restriction or condition imposed under sub-section (10) of section 12, or a plan for the redevelopment of any clearance area or in contravention of any notice, order or direction issued or given under this Act, the Competent Authority may, in addition to any other remedy that may be resorted to under this Act or under any other law, make an order directing that such erection shall be demolished by the owner thereof within such time not exceeding two months as may be specified in the order, and on the failure of the owner to comply with the order, the building so erected shall be liable to forfeiture or to summary demolition by an order of the Competent Authority and

the expenses of such demolition shall be recoverable from the owner as arrears of land revenue :

Provided that, no such order shall be made unless the owner has been given a reasonable opportunity of being heard.

(2) Forfeiture under this section shall be adjudged by the Competent Authority, and any property so forfeited shall be disposed of as the Competent Authority may direct; and the cost of removal of the property under this section shall be recoverable as an arrear of land revenue.

(3) For the purpose of causing any building to be demolished under sub-section (1) the Competent Authority may use or cause to be used such force as may be necessary."

13. There is absolutely nothing on record to show that defendants are acting high handedly or without following due process of law. Incidentally, it must be noted that though, other 3 buildings on the said plot have been demolished, no one including Plaintiff challenged the S.R. Scheme or the action of the defendants. It has come on record that suit building consists of 16 rooms and occupation of 13 rooms have in fact joined S.R. Scheme and vacated the rooms. All this goes to show that defendants are not acting illegally. So, it can not be said that there is reasonable apprehension in the mind of Plaintiff that defendants would act illegally and without following due process of law. So, the learned Trial Judge has rightly held that Plaintiff has failed to make out prima facie case for granting temporary injunction.

14. Much is made about the fact that the Trial Judge did not frame specific issue regarding the maintainability of the suit in view of the provisions of Section-42 of the said Act. Shri Anil Singh, learned Advocate for the Plaintiff submitted that in view of

the judgement in **Meher Singh V/s. Deepak Sawhny and another 1999(1) Bom.C.R.107** it was mandatory on the part of the Trial Court to frame specific issue in that behalf and then to give finding on the same. Firstly, it must be noted that defendant had taken specific contention that Plaintiff is not entitled for temporary injunction as prayed in view of the provisions of Section-42 of the said Act. Though, such contention was taken neither party had insisted that the specific issue to that effect be framed and it be tried as preliminary issue. Even then admittedly, both the learned Advocates advanced their arguments on the said point while arguing the application for temporary injunction. None of them had expressed that they wanted to lead any oral evidence on the said point. So, under such circumstances, it can not be said that there was any error on the part of the learned Trial Judge in considering application of the said Section while dealing with application for temporary injunction. Even in the above cited ruling it has not been laid down that specific preliminary issue has to be framed under the above mentioned circumstances. All that has been

the said in the said ruling is if preliminary issue for jurisdiction is framed and if party desires to lead oral evidence then, in that event even at that stage party is entitled to lead such evidence and the Court can consider the issue. So, I have no hesitation to hold that under the circumstances of the present case, there was no bar in considering the provisions of Sections-42 and 22 of the said Act and the said provisions are as follows :-

42. Bar of jurisdiction.

Save as otherwise expressly provided in this Act, no civil court shall have jurisdiction in respect of any matter which the Administrator, Competent Authority or Tribunal is empowered by or under this Act, to determine; and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

22. Proceedings for eviction of occupiers (or for issue of distress warrant) not to be taken without permission of Competent Authority.

(1) Notwithstanding anything contained in any other law for the time being in force, no person shall except with the previous permission in writing of the Competent Authority-

(a) institute, after commencement of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, any suit or proceeding for obtaining any decree or order for the eviction of an occupier from any building or land (in a slum area or for recovery of any arrears of rent or compensation from any such occupier, or for both; or)

15. From the above provisions, it is prima facie

clear that Plaintiff is in fact not entitled to file present suit and the learned Trial has also rightly negatived Plaintiff's case in that behalf.

16. It is needless to say that if temporary injunction as prayed is granted in favour of Plaintiff then lot of inconvenience and hardship will be caused to defendants and consequently to several other persons who are entitled to occupy the tenements in the newly constructed building under S.R. Scheme. Granting of temporary injunction as prayed would amount to stall the entire process under S.R. Scheme. As against this if Plaintiff is entitled to get alternate accommodation as per law, he will get the same. So, the balance of convenience is certainly not in favour of the Plaintiff.

17. In view of above, I do not find any reason to interfere with the order passed by the learned Trial Judge. Hence, I pass the following order :-

O R D E R

Appeal from order No.650 of 2007 is dismissed

with costs.

At this stage, learned Advocate for the appellant submits that the operation of the above mentioned order be stayed for a period of 4 weeks.

Hence, the above order is stayed till 08/10/2007.

(S.R. SATHE,J.)